

STATE OF MICHIGAN
COURT OF APPEALS

JAMES JACQUES,

Petitioner-Appellee,

v

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondent-Appellant.

UNPUBLISHED

August 23, 2007

No. 268016

Oceana Circuit Court

LC No. 05-005068-AA

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Respondent appeals by leave granted from the circuit court's order reversing the order of respondent's director, which denied petitioner's request for a special exception to build a driveway in a critical dune area. We reverse and remand for further proceedings.

Petitioner planned to build a lakeside home in a critical dune area, MCL 324.35301(c), in the McCall Estates subdivision in Pentwater. The building site on the parcel is separated from the nearest road by a valley, over which petitioner wanted to construct a driveway that would continue to an attached garage. The Sand Dune Protection and Management Act (SDPMA), MCL 324.35301 *et seq.*, restricts certain uses of critical dune areas unless a variance is issued under a local zoning ordinance or respondent permits a special exception if the local unit of government does not have an approved zoning ordinance, as is the case here. MCL 324.35316(1).

Respondent denied petitioner's application for a permit or a special exception to build a driveway, proposing instead that he install a parking area adjacent to the road and a boardwalk and stair system to connect the parking area to the home. The circuit court reversed respondent's decision, finding that the evidence equally supported the driveway and park-and-walk design proposals, so "the prerogative ought to be with the property owner."

"This Court's review is limited to determining whether the circuit court 'misapprehended or grossly misapplied' its review of the agency's factual findings." *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 62; 678 NW2d 444 (2003), quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). With regard to matters of law, this Court must determine whether the circuit court "'applied the correct legal principles.'" *Id.* at 64, quoting *Boyd, supra* at 234.

We first address petitioner's assertion that respondent did not have the statutory authority to regulate his driveway proposal because its impact on the critical dune areas throughout the state, considered as a whole, was insignificant. MCL 324.35316 provides in relevant part as follows:

(1) Unless a variance is granted pursuant to section 35317, a zoning ordinance shall not permit the following uses in a critical dune area:

* * *

(d) A use involving a contour change that is likely to increase erosion, decrease stability, or is more extensive than required to implement a use for which a permit is requested.

* * *

(f) A use that involves a vegetation removal that is likely to increase erosion, decrease stability, or is more extensive than required to implement a use for which a permit is requested.

(g) A use that is not in the public interest. In determining whether a proposed use is in the public interest, the local unit of government shall consider both of the following:

(i) The availability of feasible and prudent alternative locations or methods, or both, to accomplish the benefits expected from the use. . . .

(ii) The impact that is expected to occur to the critical dune area, and the extent to which the impact may be minimized. [MCL 324.35316(1)(d), (f), (g).]

The SDPMA defines the term "use" in relevant part as "a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person." MCL 324.35301(j). It further defines a "contour change" as including "any grading, filling, digging, or excavating that significantly alters the physical characteristic of a critical dune area." MCL 324.35301(a). The phrase "critical dune area" refers to "a geographic area designated in the 'atlas of critical dune areas' dated February 1989 that was prepared by the department." MCL 324.35301(c).

Respondent rejected petitioner's interpretation of the SDPMA, finding that it was not consistent with the statutory language and "would effectively preclude a meaningful examination of a project's impact to the resource. This, in turn, would vitiate the legislative directive that the use of these resources 'shall occur only when the protection of the environment and the ecology . . . is assured.' MCL 324.35302(c)." Respondent's final order adopted the hearing referee's conclusion that the proposed driveway was a use that involved a contour change and a significant alteration of the physical characteristics of the impacted critical dune areas. Because respondent's interpretation of the SDPMA comports with the language of the statute, we give it

deference and conclude that this legal conclusion was authorized by law. *Romulus, supra* at 64-65; *Lake Isabella Dev, Inc v Village of Lake Isabella*, 259 Mich App 393, 401; 675 NW2d 40 (2003).

The circuit court's review of respondent's factual findings should have been "limited to determining whether the decision was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, or was clearly an abuse of discretion." *Romulus, supra* at 62-63, citing Const 1963, art 6, § 28. Competent and material evidence is evidence that is admissible and relevant. *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 113, 122; 553 NW2d 646 (1996). Judicial review for "substantial evidence" requires review of the whole record, and while such review is not de novo, "it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency." *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). Moreover,

"substantial evidence" is that which a reasonable mind would accept as adequate to support a decision. Substantial evidence is more than a mere scintilla but less than a preponderance of evidence. *Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn.*

When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result. Great deference must be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. [*McBride, supra* at 123 (citations omitted, emphasis added).]

The circuit court in this case misapprehended or grossly misapplied its review of respondent's factual findings. In its initial ruling on the matter, the circuit court asserted that because, in its opinion, the driveway proposal and the park-and-walk proposal were equally supported by the evidence, "the prerogative ought to be with the property owner." However, it does not matter which way the circuit court believed the evidence preponderated, as long as respondent's decision was supported by substantial evidence. *McBride, supra* at 123.

The circuit court also stated that it could not see anything in the record to indicate that the driveway would be more detrimental to the dunes than the park-and-walk proposal. However, the hearing referee found that the park-and-walk design impacted less square footage, confined that impact to a more limited area of the property while minimizing impacts to regulated slopes, that the access provided by the park-and-walk proposal would more closely follow the natural terrain, and that it would require less vegetation removal to implement. These findings were adopted in respondent's final order, in which respondent's director emphasized that the impact to the dunes would be greater under the driveway proposal because the proposed driveway would largely be located on slopes with an incline measure in excess of 33 percent.

The circuit court erred by substituting its judgment for that of respondent because respondent's decision was supported by substantial evidence. *McBride, supra* at 123.

Specifically, evidence was presented that a parking area of approximately 400 square feet would be adequate and standard for a single-family home. Along with the parking area, respondent proposed that petitioner construct a road connector of approximately 200 square feet and a boardwalk with up to 300 square feet of impact. In order to provide 400 square feet of parking area, evidence was presented suggesting that an additional 40 square feet of the dune would be impacted. Thus, the maximum total impact to the dune under the park-and-walk proposal was 940 square feet. Approximately 600 square feet of the park-and-walk proposal would impact slopes with an incline measure in excess of 33 percent, not including the boardwalk area. The 12-foot wide driveway proposal would have impacted 1,620 square feet total, with more than 1,100 square feet located on slopes with an incline measure greater than 33 percent. Petitioner's expert witness testified that at best, the driveway proposal could be reduced to approximately 950 square feet of impact on steep slopes.

Looking at this evidence as a whole, it is clear that no matter how the evidence is viewed, the driveway proposal impacts both more square footage overall and more square footage on slopes with an incline measure in excess of 33 percent. Evidence was also presented that the park-and-walk proposal better confined the area of impact, i.e., the majority of the square footage required to facilitate access to the home was near the road and more closely followed the natural terrain, while the driveway proposal required more extensive removal of vegetation.

Nor does the circuit court's subsequent reference to the correct legal standard in a supplemental ruling alleviate its initial error. In its supplemental ruling, the circuit court indicates that the hearing referee found that the two proposals stood on an equal basis and that neither would necessarily have a detrimental impact on the dunes. The circuit court misunderstood the proposal for decision. The hearing referee indicated that little evidence had been presented suggesting that the driveway would increase erosion or decrease stability, but found that fact irrelevant under MCL 324.35316(1)(d) because the driveway involved a more extensive use than necessary in light of the availability of the park-and-walk alternative. The circuit court proceeded to compound the error by relying on facts not supported by the administrative record to substantiate its decision. Because the circuit court failed to give proper deference to respondent's decision, it grossly misapplied its review of that decision. *Romulus, supra* at 63.

Petitioner also argues that the circuit court was right to reverse respondent's decision because the hearing referee gave insufficient weight to petitioner's safety concerns with regard to the park-and-walk design. With regard to safety, the hearing referee found as follows:

Obviously, parking and accessing a vehicle at a point some 24 feet above grade may pose potential safety issues. That being said, it is equally obvious a "park and walk" method is utilized in a number of residential developments in the area. In fact, the owner of the neighboring parcel, Donald and Doris Thompson, wrote four letters to the LWMD [Land and Water Management Division] between August 9, 2002 and April 23, 2004, and had at least one telephone conversation with Mr. Saldivia on May 13, 2003. See exhibits R-10, R-11. Essentially, their position mirrors that of the LWMD, with the added fact that when they built their home in 1991-1993 they were required to use a "park and walk" installation similar to that proposed here, which they have found to be generally satisfactory. Their installation is pictured in Exhibit R-9 and has been viewed by this writer as

part of the site view conducted immediately before the hearing. It is also evident from photographs of similar installations in the area that all but one (Exhibit R-12) appear to be substantially above grade. This is especially true of those depicted in Exhibits R-10 and R-11 (Brewis property), and Exhibit R-13 (Nelson property). In addition to the height of the parking areas, both involve substantial descending stairways to the residences. The “park and walk” alternative proposed in this case does not appear to be substantially different from those projects. Additional installations with somewhat less vertical incline are pictured in Exhibit R-12 (McCall property), and Exhibit R-14 (unidentified).

The second fact that calls into question the stated safety concern is that using a driveway, especially in inclement weather, with as steep a grade as is contemplated in the proposal could also be deemed “unsafe” under Petitioner’s logic. In other words, the potential of a vehicle or person falling from the elevated parking area, as compared to a vehicle going off an elevated driveway, is basically comparable. Along the same lines, emergency vehicle access would appear to be limited under either proposal. Therefore, it is apparent the safety concerns between the two proposals are not materially different.

It is apparent that the hearing referee’s finding that petitioner’s safety concerns were questionable at best is supported by substantial evidence. The hearing referee cited his own visit to the site and that of a neighbor with a park-and-walk installation, as well as photos of other neighboring properties with similar above grade park-and-walk installations. From the fact that these installations have been in existence for many years without any evidence having been presented that there have been safety related incidents connected thereto in the past, one can infer that they are reasonably safe. Contrarily, there is no question that a vehicle sliding off a driveway or roadway in inclement weather is a common occurrence, and one that could pose a danger where, as proposed here, the driveway is at a steep incline. Because there is substantial evidence in the record to support respondent’s findings with regard to petitioner’s safety concerns, those findings were entitled to deference. *Romulus, supra* at 63.

Petitioner also claims the hearing referee erred by failing to consider petitioner’s personal circumstances, specifically his wife’s osteoporosis, in deciding whether a practical difficulty would occur if the special exception to build the driveway was not granted. MCL 324.35317 provides that a special exception may be issued if “a practical difficulty will occur to the owner of the property” if the special exception is not granted. MCL 324.35317(1). In determining whether a practical difficulty will occur, primary consideration is to “be given to assuring that human health and safety are protected by the determination and that the determination complies with applicable local zoning, other state laws, and federal law.” *Id.*

The SDPMA sets forth a model zoning plan for critical dune areas of this state. MCL 324.35301(f). Under zoning law, a practical difficulty may be found if “the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner.” *Norman Corp v East Tawas*, 263 Mich App 194, 203; 687 NW2d 861 (2004). “[T]he concept of ‘practical difficulty’ in zoning law relates to problems inherent in the property itself, not to the personal conditions of its occupants.” *Davenport v Grosse Point Farms Bd of Zoning Appeals*, 210 Mich App 400, 403 n 1; 534 NW2d 143 (1995); see also *Farah v Sachs*, 10 Mich App 198, 204; 157 NW2d 9 (1968). Because

respondent's interpretation of the SDPMA as not permitting consideration of the personal difficulties of petitioner in determining the existence of a practical difficulty comports with the language of the statute and zoning law more broadly, it was authorized by law and must be given deference. *Romulus, supra* at 64-65; *Lake Isabella Dev, Inc, supra* at 401.

We reverse and remand for entry of an order reinstating the final determination and order of the DEQ.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen